# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

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No. 320

JOSEPH G. BATTAGLIA, ARTHUR G. BECKER, ET AL.,
Petitioners,
vs.
GENERAL MOTORS CORPORATION, a Delaware Corporation

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No. 321

FRANK HOLLAND and PETER J. SANCHI, Individually, etc.,
Petitioners,
vs.
GENERAL MOTORS CORPORATION

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No. 322

WILLIAM S. HILGER, SAMUEL KIRCHER and JOSEPH J. VILLELLA, Individually, etc.,
Petitioners,
vs.
GENERAL MOTORS CORPORATION

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No. 323

WALTER J. CASHERTA, Individually, etc.,
Petitioners,
vs.
GENERAL MOTORS CORPORATION

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## PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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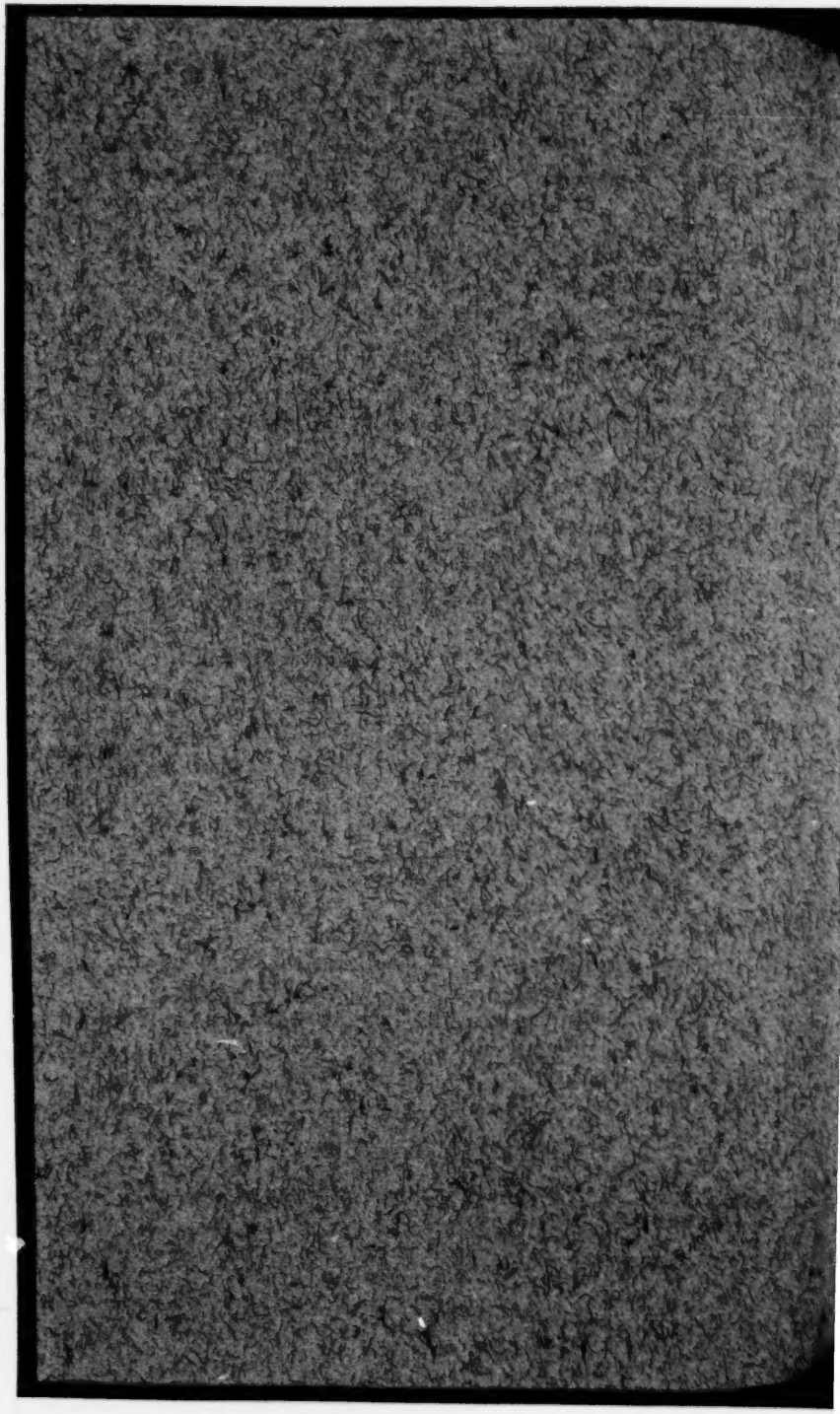
MARLY FLEISCHMANN,
DAVID DIAMOND,
Counsel for Petitioners.



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**Nos. 320-21-22-23**

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*vs.*

GENERAL MOTORS CORPORATION, A DELAWARE CORPORATION,

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# PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petition respectfully shows:

## I

## The Matter Involved

The petitioners in these cases challenge the validity under the Federal Constitution of the Portal-to-Portal Act of 1947 (29 U. S. C. A. 251-262, 61 Stat. 84, 90). They assert, first, that this statute deprives them of their property without due process of law; and, second, that the statute usurps the functions of the federal judiciary by attempting to dictate the decision in particular pending cases.

This petition presents the first test of the constitutionality of the Portal-to-Portal Act to reach this Court. The issues

presented are believed to be of grave and permanent significance, involving fundamental questions as to the relationship between Congress and the courts.

## II

### Proceedings in the Courts Below

This Court is asked to review four judgments of the United States Court of Appeals for the Second Circuit entered July 8th, 1948, affirming judgments of the United States District Court of the Western District of New York dismissing the complaints in each case. The four cases present identical questions and were heard and considered together in the courts below.

The actions were commenced before the enactment of the Portal-to-Portal Act in 1947. Each complaint stated a cause of action under the Fair Labor Standards Act of 1938 (29 U. S. C. A. 201-219, 52 Stat. 1060-1069), as it existed prior to the enactment of the Portal-to-Portal Act of 1947. The complaints in substance allege that each plaintiff, as an employee of the defendant, performed over-time work, labor and services for the defendant for which he was not compensated as required by the Fair Labor Standards Act (R. 19-27). Among the principal types of uncompensated over-time activities alleged are necessary changes into and out of work clothes or protective clothing, and the obtaining, preparing and returning of tools and equipment required in plaintiffs' work; the same type of activities on the employer's premises as were considered compensable by this Court in *Anderson* v. *Mt. Clemens Pottery Company*, 328 U. S. 680, 90 L. Ed. 1515.

The Portal-to-Portal Act became law on May 14th, 1947. Shortly thereafter, the defendant moved in each case to dismiss the complaint under Rule 12 b (1) of the Rules of Civil

Procedure "for lack of jurisdiction over the subject matter" (R. 28-29).

In setting forth the grounds of the motion, the defendant generally followed the wording of the Portal-to-Portal Act. The theory of the motion was that the complaints failed to allege facts showing the recovery sought by the plaintiffs to be based upon an express provision of a contract, or upon custom or practice, and failed to show that plaintiffs' activities were "engaged in during the portion of the day with respect to which they were made compensable under any alleged contract provision, custom or practice which allegedly makes such activities compensable."

Prior to the argument of the motion in each case, plaintiffs specifically raised the objection that the Portal-to-Portal Act was unconstitutional, filed appropriate notice to that effect and served it upon the United States Attorney General (R. 30). Thereupon, the United States of America intervened and filed a brief in support of the constitutionality of the Act.

On December 15, 1947, Judge John Knight of the United States District Court for the Western District of New York handed down an opinion upholding the constitutionality of the Act and directing the entry of orders dismissing the complaints, unless amendments were made stating a cause of action under the Portal-to-Portal Act (R. 37-53). No such amendments being made, final orders were entered in each case on March 15, 1948, dismissing the complaints (R. 56-57).

Petitioners filed a consolidated appeal to the United States Court of Appeals for the Second Circuit where the judgments of the District Court were unanimously affirmed with an opinion by Chase, J. (R. 69-82).

Statutory and constitutional provisions which are involved in this appeal are set out in an Appendix to the brief submitted with this petition.

## III

### The Questions Presented

The questions presented for the determination of this court are these:

1. May the Portal-to-Portal Act of 1947 be upheld as a valid congressional regulation of the jurisdiction of the Federal Courts, irrespective of its substantive effect?

2. Does the Portal-to-Portal Act of 1947 deprive the petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States?

3. May the Portal-to-Portal Act of 1947 be upheld as a valid use of the power to regulate commerce, by reason of the Congressional finding of a national emergency?

4. Does the Portal-to-Portal Act of 1947 violate Article III, Sec. 1 of the Constitution, as an attempt by Congress to exercise judicial power reserved to the courts?

## IV

### Jurisdiction

The jurisdiction of this Court is based upon Title 28, United States Code, Sections 1254(1) and 2101(c). The judgments of the Court of Appeals were entered on July 8th, 1948 (R. 82) and this petition is filed within 90 days thereof.

## V

### The Basis for This Court's Jurisdiction to Review the Judgments and the Reasons Relied upon for the Allowance of the Writ.

1. The Court of Appeals, in holding the Portal-to-Portal Act of 1947 constitutional, has decided an important and

substantial Federal question which has not been, but should be settled by this Court.

The question of the constitutionality of this legislation has been inherent and notorious since it was first proposed. At one point, alternative provisions were included in the Senate Bill, to take effect if the preferred version should be held invalid.

See: Bureau of National Affairs, "Special Analytical Report" Pg. 83, 47 Columbia Law Review 1010.

Since its validity has been under attack in the courts, many doubts have been expressed as to the propriety and constitutionality of the Act.

See: *Cochran* v. *St. Paul & Tacoma Lumber Co.*, 73 F. Supp. 288;

*Boehle* v. *Electro Metallurgical Co.*, 72 F. Supp. 21;

*Sveltik* v. *Vultee Aircraft Corp.*, 16 U. S. Law Week 2161, 7 W. H. Cases 282 (Not officially reported).

Finally, although the Act has been upheld in three circuits by the Courts of Appeal, there is no unanimity of opinion on the basis of the decision.

*Seese* v. *Bethlehem Steel Company*, 168 Fed. 2d 58;
*Rogers* v. *Reynolds*, 166 Fed. (2d) 317.

An authoritative decision of this court is required in order that the rights of several thousand litigants in actions now pending in the District Courts may finally be determined.

2. The Court of Appeals has decided important questions of Federal law in a way which appears to conflict with applicable decisions of this court.

(a) In holding that the rights of which petitioners were deprived by Section 2(a) of the Act are not protected by the Fifth Amendment to the United States Constitution,

the Court of Appeals failed to follow and apply the following decisions of this court, among others:

*Pacific Mail Steamship Company* v. *Joliffe*, 2 Wallace 450, 17 L. Ed. 805;
*United States* v. *General Motors Corporation*, 323 U. S. 373, 89 L. Ed. 311;
*Ettor* v. *City of Tacoma*, 228 U. S. 148, 57 L. Ed. 773;
*Coombes* v. *Getz*, 285 U. S. 434, 76 L. Ed. 866.

(b) In failing to condemn the Portal-to-Portal Act as a legislative invasion of the judical power in violation of Article III, Section 1 of the Constitution, the Court of Appeals reached a decision not consistent with the following authorities in this Court:

*Kilbourn* v. *Thompson*, 103 U. S. 168, 26 L. Ed. 377;
*James* v. *Appel*, 192 U. S. 129, 48 L. Ed. 377;
*Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210, 53 L. Ed. 150;
*United States* v. *Klein*, 13 Wallace 128, 20 L. Ed. 519.

Wherefore, your petitioners respectfully pray that Writs of Certiorari issue to review the decision of the Court of Appeals for the Second Circuit in these actions.

For the Petitioners:

MANLY FLEISCHMANN,
DAVID DIAMOND,
*Counsel for Petitioners.*

Dated: SEPTEMBER 29TH, 1948.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1948

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

### Statement

These appeals involve the constitutionality of the Portal-to-Portal Act of 1947 (Title 29 U. S. C. 251-262; 61 Stat. 84-90). The petitioners contend that this statute, as construed by the courts below, deprives them of their property without due process of law in violation of the Fifth Amendment, and exercises judicial power reserved to the courts in violation of Article 3 Section 1 of the Constitution. Relevant portions of the Statute and Constitution are set forth in an appendix to this brief.

### Point I

**The Validity of Sec. 2(D) of the Portal-to-Portal Act of 1947, attempting to withdraw jurisdiction of this type of case from the Federal courts, depends upon the validity of the destruction of substantive rights attempted by Sec. 2(a).**

Since the Court of Appeals adopted petitioners' contention on this point, no further argument is deemed appropriate in this connection. As the court below said:

> "We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation. . . . Under this view, subdivision (d) on the one hand and subdivisions (a) and (b) on the other will stand or fall together." (R. 73.)

## Point II

**The Portal-to-Portal Act violates the Fifth Amendment to the Constitution by depriving petitioners of their property without due process of law.**

The Fifth Amendment to the Constitution provides that the federal government may not deprive an individual of his property "without due process of law". It is well settled that "a vested right of action is property • • • and is equally protected against arbitrary interference." *Pritchard* v. *Norton*, 106 U. S. 124, 132, 27 L. Ed. 104, 107.

The extent of the constitutional protection of property rights is set forth in a recent opinion of this Court in a case where the present defendant successfully invoked the identical constitutional safeguards upon which these petitioners now rely:

> "The constitutional provision" (i.e., the Fifth Amendment) "is addressed to every sort of interest the citizen may possess."
>
> *United States* v. *General Motors Corporation*, 323 U. S. 373, 378, 89 L. Ed. 311, 318.

Many of the cases which pass upon the right of a legislative body to interfere with vested contractual rights are concerned with state legislative activity. These cases, therefore, involve the Fourteenth Amendment, which is the "due process" provision applicable to state activity, or Article 1, Sec. 10, which forbids the impairment of the obligation of a contract by a state. However, the treatment of this subject by this court has been almost identical with respect to controversies between individuals, whether state or legislative activity is being reviewed. In other words, the Fifth Amendment protects private contractual rights and vested causes of action against federal legislative impairment, in the same manner and to the same extent as

do the Fourteenth Amendment and Sec. 10 of Article 1 with respect to comparable state legislation.

During the congressional debates accompanying the passage of the Portal-to-Portal Act, it was claimed that a general exception to the rule protecting vested rights from retroactive legislative impairment exists with respect to rights which have accrued under a statute. It was asserted that such rights never vest in a constitutional sense, and disappear with the repeal of the statute which created them. The court below was apparently of this opinion although it did not base its decision primarily on this point, since it considered the exact nature of the rights asserted to be immaterial. It is submitted, however, that a review of the decisions on this point by this court will demonstrate that no such general exception with respect to "statutory rights" has ever been recognized. We refer to a few pertinent cases.

In *Pacific Mail Steamship Company* v. *Joliffe*, 2 Wallace 450, 17 L. Ed. 805, this court considered a California statute which provided that a pilot was entitled to half pilotage fees when, under certain circumstances, he had offered his services to a vessel and those services had been refused. Pending a suit for recovery of the compensation *due under the statute*, the legislature repealed the statute. In permitting the recovery, as against the argument that the original right was defeasible because "statutory" in origin, the court said, at pp. 806-807 of the L. Ed. report:

> "The claim to half pilotage fees, it is true, was given by the statute, but only in consideration of services tendered * * *. If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. * * *
>
> "The claim of the plaintiff below for half pilotage fee, resting upon a transaction regarded by the law as

a *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action; the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed."

It will be obvious that there is a perfect analogy between the *Joliffe* case and the present case: In both cases recovery was sought for compensation fixed by the terms of a statute which was repealed while an action to recover was pending. In both cases it might well be argued that no right of recovery could exist without the statute. In fact, the present case is stronger than the *Joliffe* case, because here the services were not merely tendered, but actually performed.

In *Ettor* v. *City of Tacoma,* 228 U. S. 148, 57 L. Ed. 773, an action had been brought under the terms of a state statute which required compensation from a municipality for damage to the plaintiff's property, resulting from street grading. Before judgment, the statute was repealed, and the suit was then dismissed.

In reversing the judgment of dismissal, this court said:

"The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which

had vested before the repealing act,—a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation." (p. 156 of the U. S. report.)

The latest case in this court to apply this doctrine was *Coombes* v. *Getz*, 285 U. S. 434, 76 L. ed. 866. A provision of the California state constitution created a liability on the part of directors of corporations to creditors for all moneys misappropriated by corporate officers. During the pendency of a suit to recover on this statutory liability, the section making the directors liable was repealed. In the absence of such a section, there was no liability at common law. Upon appeal to this court the creditor was permitted to recover. We quote from the opinion:

"The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right * * *) to enforce his cause of action upon the contract. (p. 442 of the U. S. report.)

"Here both parties acted. The creditor extended credit to the corporation; and his action in so doing under the state constitutional provision brought into force for his benefit the constitutional obligation of

> the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eyes of the law, created against himself a contractual liability in the nature of a suretyship." (p. 448 of the U. S. report.)

From the foregoing review of the authorities, it is apparent that as a general rule statutory rights are protected against retroactive legislative destruction to the same extent as any other vested rights. We may now consider some of the cases which the congressional debaters presumably had in mind when they so facilely expressed the opinion that "statutory rights do not vest".

(1) *Inchoate statutory rights based on a contingency which has not happened.* It is well settled that a statutory right which by the terms of its enactment does not ripen until the happening of a specified contingency, may be destroyed by a repealing statute which takes effect prior to such happening. Typical was *Randall* v. *Krieger*, 90 U. S. 137, 23 L. ed. 124, where it was held that the statutory right of a widow to property of her deceased husband is subject to legislative invasion before the death of the husband.

(2) *Statutes which confer a gratuity.* A second class of case in which statutory rights are held subject to repeal involves statutes which confer a gratuity, resting on no legal or moral claim (other than the statute), and for which no consideration has been given. Such a case was *In re Hall*, 167 U. S. 38, 42 L. ed. 69, where a repealing statute, *pendente lite*, was held valid upon the ground that the original statute simply conferred a gratuity:

> "This Court had just decided that the act of February 13, 1895 (28 Stat. at L. 664, chap. 87), simply conferred a gratuity upon the persons covered by its provisions; that there was no element of a legal or an equitable claim in their favor against the municipal

> authorities of the District, but that the act provided for a gift which was wholly without consideration." (pp. 42-43 of the U. S. report.)

It need hardly be pointed out that the petitioners here do not seek to vindicate a right founded upon a governmental or personal bounty. They seek no gratuity from the United States but simply attempt to enforce a right based upon services rendered by employees for private employers, under an act which required that all of an employee's time given to his employer should be compensated.

(3) *Statutes which create a penalty.* As a corollary to the rule respecting legislative gratuities, legislation creating penalties may be repealed even if such action interferes with causes of action pending at the time. Typical of this exception was the case of *Norris* v. *Crocker,* 13 Howard 429, 14 L. ed. 210, where it was held that an action for the penalties established by the Fugitive Slave Law of 1793, in favor of a slave owner and against a person who had harbored a slave, was not maintainable after the statutory provision had been repealed. The court pointed out that the penalty was payable regardless of loss or injury, and accordingly no right could vest therein.

(4) The largest and most important class of cases in which some interference with statutory right is permitted involves *changes in available remedies provided by statute.* The general rule on this subject is stated in *Gibbes* v. *Zimmerman,* 290 U. S. 326, 332, 78 L. ed. 342, 347;

> "* * * although a vested cause of action is property and is protected from arbitrary interference (*Pritchard* v. *Norton,* 106 U. S. 124, 132, 27 L. ed. 104, 107, 1 S. Ct. 102), the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure."

The quotation indicates the limitation of the doctrine: *it may not be invoked to validate the entire destruction of rights through the denial of any effective remedy.* It is clear that the doctrine cannot apply to a statute such as is here considered, which purports to eliminate both right and remedy *in toto.* Even in cases such as *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 78 L. ed. 413, which have upheld reasonable legislative changes in available remedies, the court has been careful to note the limitation:

> "This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." (p. 439 of the U. S. report.)

(5) *Statutes which cure a defect in administration or legalize previously illegal contracts.* A final class of cases in which legislative alteration of existing statutory rights or liabilities is permitted includes cases such as *Paramino Lumber Co.* v. *Marshall,* 309 U. S. 370, 84 L. ed. 814, and *National Car Loading Corp.* v. *Phoenix-El Paso Express,* 176 S. W. 2d 564, cer. den., 322 U. S. 747, 88 L. ed. 1578. In the *Paramino* case, this court upheld a private act of Congress directing a review of a final order denying compensation to a claimant, after the time for review had expired. The act had been passed in consequence of the fact that the testimony forming the basis for the original finding turned out to be mistaken, and the mistake could not have been earlier discovered. Justice Reed, writing for the court, said:

> "It" (the private act) "does not operate to create new obligations where none existed before. It is an act to cure a defect in administration developed in the handling of a compensable claim. If the continuing

injury had been known during the period of compensation, payments of the same amount due under the award authorized by this act would have been due to the employee. In such circumstances we see no violation of the due process clause." (p. 378 of the U. S. report.)

On a similar theory, this court has upheld the propriety of a legislative change permitting the bringing of a suit barred under the existing statute of limitations (*Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 89 L. ed. 1628). The same doctrine was applied for the benefit of the government in *Graham* v. *Goodcell*, 282 U. S. 409, 75 L. ed. 415, but in so doing the court expressly approved the principle of the *Joliffe* and *Ettor* cases cited above:

"The question is whether these circumstances remove the case from the operation of the general rule that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed. *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 457, 458, 17 L. ed. 805, 807; *Ettor v. Tacoma*, 228 U. S. 148, 156, 57 L. ed. 773, 778, 33 S. Ct. 428; *Forbes Pioneer Boat Line v. Everglades Drainage Dist.*, 258 U. S. 338, 340, 66 L. ed. 647, 649, 42 S. Ct. 325." (p. 426 of the U. S. report.)

During the congressional debates, considerable attention was paid to the denial of certiorari in the *National Car Loading* case, *supra*, though in the absence of an opinion by this court, it is evident that the case can not be relied upon as overthrowing the clear line of decision to which we have referred. In that case, the Supreme Court of Texas upheld a statute which legalized a contract, illegal when made, and by so doing terminated a pending cause of action based upon the former statute. Obviously, the case bears no similarity to the present case, because there the plaintiff had been deprived of nothing and had furnished no consideration. The opinion in the Texas court is based almost

entirely upon the cases approving "curative legislation," such as the *Paramino* case just discussed.

We may now consider whether the present case is governed by the rules enunciated in the *Joliffe* case and in the succeeding opinions of this court, or whether it falls within a supposed exception permitting the repeal and destruction of rights which have accrued under a statute. The answer is perfectly clear, since the present case bears no resemblance to any of the exceptions which we have pointed out. The right which the plaintiffs seek to enforce is not in any sense a gratuity as to them, nor is it a penalty as against their employers; this court has expressly so held and has stated that even the liquidated damage provision "is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 707, 89 L. ed. 1296, 1309.

As in the *Joliffe* case, the employer by accepting the services entered into a contractual relationship, and the contract included the provisions of the statute in its terms by operation of law. (Compare the recent decision of the New York Court of Appeals in *Filardo* v. *Foley Bros.*, 297 N. Y. 217.)

Just as in the *Coombes* case, plaintiffs here have done everything necessary to perfect their cause of action and have furnished consideration through the performance of services. By reason thereof, rights have accrued and vested which may not now be destroyed. The contract was clearly legal when made, and the new statute does not purport to correct any defect in the administration of justice. On the contrary, the statute plainly falls within the prohibition against legislative action destroying all remedy re-

ferred to in *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 682, 74 L. ed. 1107, 1114.

It follows that the Portal-to-Portal Act of 1947 must be declared unconstitutional, as an attempt to take the property of these petitioners without due process of law.

## Point III

**The Congressional finding of an "Emergency" calling for the use of the commerce power cannot justify the total destruction of petitioners' property rights.**

The principal basis of the Court of Appeals' decision is found in the following statement from its opinion:

> "It is the fact that here Congress was exercising its commerce power which, we think, primarily serves to distinguish the cases relied upon by appellants." (R. 80)

We suppose that the court did not intend to hold that the commerce power alone was immune from the operation of the Fifth Amendment. On the contrary, the Court in an earlier part of its opinion (R. 73) cites with approval *Louisville Joint Stock Land Bank* v. *Radford, supra*, 295 U. S. 555, 589 where this court had said:

> "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."

Even the congressional war power is subject to the same restriction:

> *United States* v. *General Motors Corp., supra*, 323 U. S. 373, 89 L. ed. 311.

What the court below really had in mind appears, we submit, from this sentence:

"The congressional findings, made after investigations which disclosed ample supporting facts, show fully why the enactment of the Portal-to-Portal Act was necessary to avoid great injury to interstate commerce." (R. 77-79.)

Put another way, the court found justification for the destruction of petitioners' rights in the congressional finding of a national emergency. This leads us to a consideration of the so-called "emergency doctrine" as applied by this court.

From time to time, this court has approved federal legislation on the theory that in times of national emergency, the power of Congress may be extended to an extent reasonably necessary to meet such emergency. The doctrine proceeds on the assumption that while an emergency can never create a power which theretofore did not exist, the existence of an emergency may justify the exercise of power which might otherwise be unreasonable and therefore illegal.

*Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 78 L. ed. 413.

This doctrine is subject to the following limitations:

(1) There must be a genuine emergency within the general powers of Congress to meet by legislation, and the existence of the emergency is always open to judicial scrutiny.

(2) The legislative means taken to meet the emergency must be reasonable and non-discriminatory.

(3) Rights and remedies may be impaired to some extent when such impairment is required by the emergency, but if rights are totally destroyed, the government must compensate the owners of these rights.

Typical of the "emergency" cases was *Norman* v. *B. & O. Railroad,* 294 U. S. 240, 79 L. ed. 885, the so-called "gold

clause" case. Here it was held that legislation forbidding payment in gold was within the general power of Congress because of its control over the monetary system; that the unquestioned international financial emergency justified and required such a restriction with respect to the unpaid portion of gold bonds; and that the substitution of paper payment for gold payment *only altered, and did not destroy, the rights of the bondholders.*

It will be readily seen that the present case is totally dissimilar to the gold clause case. Concededly, the Portal-to-Portal Act is valid with respect to employment after its date, just as the gold legislation was held valid with respect to payments coming due in the future. Future activities under continuing contracts within the general area of congressional control have, as the court pointed out, a "congenital infirmity", *i. e.*, they are subject to change with respect to the unexecuted portion. If this were not so, the effect "would be to place to this extent the regulation of interstate commerce in the hands of private individuals."

Again, in the present case the rights of the petitioners are not merely impaired: they are totally and irrevocably destroyed. When this is done, even for a public purpose, the Fifth Amendment requires that compensation be paid:

> "If the public interest requires and permits the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that through taxation, the burden of relief afforded in the public interest may be borne by the public."
>
> *Louisville Bank* v. *Radford,* 295 U. S. 555, 602, 79 L. Ed. 1594, 1611.

The principal case relied upon by the Court below to support its view that vested rights are subject to destruction under the congressional power to regulate commerce is *Louisville and Nashville Railroad* v. *Mottley,* 219 U. S. 467,

55 L. Ed. 297, where a claim against the railroad was settled in return for a contract by the railroad to furnish free transportation to the claimant during his lifetime. Later, a congressional enactment invalidating such contracts, both prospectively and retrospectively, was upheld. However, this Court was careful to reserve decision on the question whether the statute conclusively deprived the claimant of his vested right or merely eliminated one of the remedies available to him:

> "Whether, without enforcing the contract in the suit, the defendant in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the collision occurred, is a question not before us, and we express no opinion on it."

In a later similar case, this Court had occasion to pass on this precise point and held that the basic rights of the claimant had not been (and presumably could not have been) destroyed by the legislative enactment:

> "In the present case, therefore, the railroad company acted strictly in accordance with the law when it refused any longer to furnish transportation to the defendant in error in performance of the contract of November, 1900. But from this it by no means follows that it could refuse to make just compensation in money for the unpaid purchase price of the maps."
>
> *New York Central R. R.* v. *Gray*, 239 U. S. 583, 586.

Finally, the Portal-to-Portal legislation will not pass the judicial inquiry which must always be made, both as to the existence of the emergency and the reasonableness of the means chosen to meet it:

> "When the legislature acts directly, its action is subject to judicial scrutiny, and determination in order to prevent the transgression of these" (constitutional) "limits of power. The legislature cannot preclude that scrutiny of determination by any declaration or legis-

lative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained."

*St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38, 51, 52, 80 L. Ed. 1033, 1041.

When such a scrutiny is made here, it is abundantly clear that no emergency in fact existed. In the very case which aroused the interest of Congress (*Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680, 90 L. Ed. 1515), this Court was careful to point out that the facts and liabilities of each particular case should be determined in the light of the familiar *de minimis* rule. Following that opinion, and before the passage of this Act, the trial court in the same case had followed this rule and dismissed the particular case entirely (*Anderson* v. *Mt. Clemens Pottery Co.,* 69 F. Supp. 710). It is certain, therefore, that no "wholly unexpected liabilities, immense in amount," would "bring about financial ruin of many employers" (Portal-to-Portal Act, Sec. 1).

In this connection, we feel it proper to call the Court's attention to the economic basis of our claim that no real emergency of any kind was present when the Portal-to-Portal Act became law. Although there is a presumption of constitutionality, that presumption may be rebutted (*Thompson* v. *Consolidated Gas Utilities Corp.* (1937), 300 U. S. 55, 75, 81 L. Ed. 510, 521.) Where the constitutionality is so challenged, the court has the power and the responsibility of determining for itself whether there was sufficient public purpose to justify depriving certain employees of compensation claims against their employers (*Hairston* v. *Danville & Western Ry.,* 208 U. S. 598, 52 L. Ed. 637), and whether the facts allegedly supporting the legislation really existed (*Treigle* v. *Acme Homstead Asso-*

*ciation* (1936), 297 U. S. 189, 80 L. Ed. 575); (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 67 L. Ed. 322.)

The coverage of the Fair Labor Standards Act in 1945 involved about 21,000,000 workers (House Report No. 71 (Feb. 25, 1947) on Portal-to-Portal Act). From the reports of the Administrative Office of the United States, it appears that there were 1913 portal cases filed in the Federal District Courts. Of this number, 298 cases did not claim a definite amount and the balance of the cases claimed $5,785,-204,606.00 (House Report 71, *supra*).

A study of a list of companies involved in these actions reveals that 52 companies employing approximately 2.2 million workers accounted for approximately $2,700,000,-000.00 of these claims (See Morse, *Economic Aspects of Portal-to-Portal*, 7 Lawyers Guild Review 29). It is apparent from these figures that a small minority of employers covered by the Act were involved in portal claims, and it is a fair inference that the great majority of employers and employees concerned had complied with the Fair Labor Standards Act as construed by this Court. When it is considered that in 1946 and 1947 the total number of wage and salary workers employed in non-agricultural establishments averaged 42¾ million and 42½ million respectively (Economic Report of the President, Jan. 1948, P. 116), the limited scope of the portal problem in terms of numbers of workers of the country is clearly seen.

The financial effects of the sums involved in these portal suits are greatly exaggerated. First of all, it is clear that the large sums for which the suits were filed do not furnish a reasonable basis for the anticipated recoveries (Hearings on S. 70, at P. 303; *Morse, supra*, at P. 31). The application of the *de minimis* rule (*Anderson* v. *Mt. Clemens Pottery Co.*, 69 F. Supp. 710), the effect of the short period of limitations of many state statutes which have been sustained (*Ott* v. *Freeman & Son, Inc.*, 68 F. Supp. 445—one year stat-

ute upheld) and the possibility of reasonable settlements such as was recently reported in the *Dow Chemical Company* case (50th Annual Report, Dow Chemical Company), would also limit the actual recoveries. It is a generally known fact that hundreds of these actions have been withdrawn since the report of the Administrative Office, through settlement or by collective bargaining.

However, even assuming that the full amount alleged to be due were recovered by the employees involved, there is not a financial problem of such magnitude as to make it a matter of national concern and justify the exercise of the Congressional power to relieve the particular employers involved in these suits. The five billion dollars sued for involve claims which, in the main, accrued during the years 1941 to 1946. Spokesmen for the Internal Revenue Department estimated that sixty percent of this liability would be offset by tax refunds and that the net burden on the Treasury would be reduced to forty to forty-five percent by collection of income taxes from the workers receiving the payments. (Statement of J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, to Senate Judiciary Committee—*Morse, supra,* P. 30.) When it is realized that total compensation paid to employees for the year 1946 was 116 billion, and for the year 1947—128 billion, and that for the period 1941-1946 such compensation totalled 619 billion dollars (Economic Report of the President, *supra,* P. 110), for the seven-year period a total of 747 billion dollars, the insignificance to our national economy of even the total alleged claims becomes clear.

Although these portal claims would not reduce corporate profits directly in view of the tax rebates and possible payments from corporate reserves, it is of interest to note the amount of corporate profits during the period under consideration. Before taxes, corporate profits averaged from 17 billion in the year 1941 to 28 billion in the year 1947

(President's Report, *supra*, 119). Recently published earnings statements of the defendant herein indicate that profits for the year 1947 reached $288 million.

National City Bank's *Monthly Letter* for March 1948, contains a report of corporate earnings of 960 leading American manufacturing corporations. That publication states that 1947 net income after taxes was 50.2% higher than in 1946. For the automotive industry, in particular, 1947 profits were 581% greater than in 1946. It is perfectly plain that no possible result of these particular lawsuits could affect the complete solvency of this defendant.

Again, section 1 of the Act recites that the portal claims were "wholly unexpected liabilities." The same claim might be made about every decision which was not "expected" by the unsuccessful litigant. If this reasoning is now to receive judicial approval, a similar claim may be sanctioned as a result of the decision in *U. S.* v. *Paramount Pictures, Inc.*, 333 U. S. 131. Was this decision "unexpected" any more than the portal decision? Is Congress now to be given *carte blanche* to legislate the *Paramount* decision out of existence and therefore to do likewise in every case the decision in which the Congress disapproves?

The fact is, moreover, that these portal liabilities were clearly anticipated by decisions of the Supreme Court (*Tennessee Coal and Iron Co.* v. *Muscoda Local No. 123*, 321 U. S. 590, 88 L. Ed. 949; *Jewell Ridge Coal Corp.* v. *Local No. 6167*, 325 U. S. 161, 89 L. Ed. 1534) and by a long series of official interpretations of the Fair Labor Standards Act (*e.g.* Wage-Hour Interpretative Bull. No. 13, issued May, 1939; W-H Release G-133).

Obviously, not even Congress believed the dire forebodings recited as justifying the Act. In Point IV, *infra*, we point out that Congress attempted to outlaw only "portal to portal" claims of a non-contractual nature existing on the date of passage of the Act, while permitting enforce-

ment of identical claims arising the very next day. Here is a strange emergency indeed—an emergency so acute that Congress in one and the same statute expressly authorizes the maintenance in the future of causes of action identical with those accruing in the past which, it is claimed, must be banned in order to save industry from financial ruin.

By the same token, it must be clear that the means selected by Congress are unreasonable and illegal as a matter of law, even if the court should find justification for the declaration of an emergency. As is pointed out in the *Radford* case, *supra*, if vested rights are to be destroyed for the benefit of the public, the public must pay compensation. Here, beyond any doubt, such rights are abolished entirely, and all remedy for their enforcement is taken away. At the same time, identical rights in the future are aproved and validated. Thus, the entire financial burden of the legislation falls not upon the public, nor even upon all employees alike, but simply upon those employees whose statutory rights had been violated prior to May 14th, 1947. So far as we can determine, no court has ever held that any emergency could justify such arbitrary and discriminatory action.

## Point IV

**The portal-to-portal Act violates Article III, Section 1, of the Constitution by attempting to control the decision of pending cases through an exercise of the judicial power reserved to the courts.**

In discussing the clear delineation of the powers of the judicial branch of the federal government set forth in Article III, Section 1 of the Constitution, this Court said in *Kilbourn* v. *Thompson*, 103 U. S. 168, 26 L. Ed. 377:

> "If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial

power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred." (p. 192 of the U. S. report.)

(The specific exceptions referred to include contempt proproceedings, impeachment, etc.)

Does the Portal-to-Portal Act invade the province of the judiciary? In order to answer this, we turn first to two clear expositions of the term "judicial power" by this Court. Both opinions are by Mr. Justice Holmes:

> "The statute did not deal with the past or purport to grant or refuse a new trial in a case or cases then pending, but performed the proper legislative function of laying down a rule for the future in a matter as to which it had authority to lay down rules." (p. 137, U. S. report.)
> *James* v. *Appel,* 192 U. S. 129, 48 L. ed. 377.

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. This is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."
> *Prentis* v. *Atlantic Coastline Co.,* 211 U. S. 210, 226, 53 L. ed. 150, 158.

The foregoing principles and definitions make the answer to our inquiry clear. Again, the intention of the legislature is not left to speculation. The preamble specifically aims the Act at the courts. We quote from Sec. 1 (a):

> "The Congress hereby finds that the Fair Labor Standards Act of 1938 as amended, has been interpreted judicially in disregard of long established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities enormous in amount and retroactive in operation

upon employers with the results that, *if said Act as so interpreted for claims arising under such interpretations were permitted to stand,* * * *" (Emphasis ours).

Applying the definition of the *Prentis* case to the Portal-to-Portal Act, it will be seen that it attempts to perform an exclusively judicial funcion in that it "declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist."

This type of activity is forbidden to Congress by the Constitution, and the Supreme Court has not hesitated to invalidate legislation of this kind. We quote from the decision of this court in *U. S.* v. *Klein,* 13 Wallace 128, 20 L. Ed. 519, invalidating a statutory withdrawal of jurisdiction from the Supreme Court in a pending case:

> "The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the court of claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the judicial department of the government in cases pending before it? * * *
>
> "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power."

Only three years ago, this court, in *Pope* v. *U. S.* 323 U. S. 1, 89 L. ed. 3, referred approvingly to the *Klein* case and distinguished it from the case then under consideration:

> "* * * we do not construe the Special Act as requiring the Court of Claims to set aside the judgment in a case already decided or as changing the rules of decision for the determination of a pending case." (p. 9, U. S. report.)

We now invite the court's attention to an even more specific vice of the Portal-to-Portal Act with respect to its usurpation of judicial power. We refer to the distinction made between existing and future claims, which was mentioned briefly under Point III, *supra*. It can be demonstrated beyond argument that the court would have jurisdiction of the claims stated in the present complaint, even under the Portal-to-Portal Act, if the liability asserted had arisen after the passage of the legislation. In other words, under the rule of decision enacted by Congress, particular cases are singled out for discrimination and the rights involved are utterly destroyed (i.e., those arising before enactment), while identical claims arising after enactment are preserved intact. Congress has thus constituted itself judge and jury in disposing of these particular claims, in the plainest possible violation of Article III, Sec. 1.

To elucidate this discrimination, we turn first to Sec. 2 which bans all existing claims which are not based upon either "an express provision of a written or unwritten contract" (Sec. 2(a) 1), or upon "a custom or practice in effect at the time of such activity," (Sec. 2(a) 2).

On the other hand, Sec. 4, which deals with future claims, does not require any such provision of contract or custom as a condition precedent to liability, but permits recovery for all activities except those "preliminary to or postliminary to said principal activity or activities". The meaning of this distinction is clarified both in the congressional debates and in President Truman's message approving the Act. Senator Cooper, who managed the bill, made the following statement with respect to past claims:

> "I have explained that the reason for that is that *in order definitely and surely to relieve against past claims, a stricter rule was adopted.*" (Emphasis ours).

He was then asked by Senator Ellender:

> "Was not virtually the same rule adopted as to future claims?"

To which he answered:

"I think not." (Cong. Rec. 3-20-47; p. 2374). He then proceeded to point out the obvious fact that all "principal activity", as that term might be defined by the administrator of the Act, or by the courts, would be compensable in the future regardless of contract or custom, while such activity could not be used to sustain a past claim unless it had been the subject of a specific contract or custom.

In referring to the treatment of *future* claims under the Act, President Truman stated in his message of approval:

> "We should not lose sight of the important requirement under the Act that all 'principal activities' must be paid for, regardless of contract, custom or practice."

The same authorities clarify the meaning of the term "principal activities." President Truman again pointed out that the legislative history of the Act shows that the term is "to be construed liberally to include any work of consequence performed for the employer no matter when the work is to be performed."

The congressional debates make it clear that such activities, as changing clothes and preparing machines, when required by the nature of the work, constitute "principal activity" and are compensable in the future regardless of contract or custom. The Senate committee report gives as an example of "principal activity" the oiling and cleaning of machinery before commencing work. In the debates on the floor, Senator Cooper, in reply to a question

by Senator McGrath, specifically stated that time required for changing clothes and bathing in a chemical factory would be considered a part of "principal activity." (See *Special Analytical Report on Portal-to-Portal Act,* issued by the Bureau of National Affairs, particularly at pgs. 34 and 35; Cong. Rec., 3-20-47; pg. 2375.)

It is thus abundantly clear that the very activities detailed in paragraph "Third" of the complaints, for which recovery is sought in the present actions, are in fact "principal activity" for which recovery would necessarily be allowed if the work had been done after May 14, 1947, the date of approval of the Act. This discrimination between identical cases, and decision of particular cases, is purely and exclusively a judicial function reserved to the courts, as is shown by the quotations above.

We also wish to call the court's attention to a case decided by the Supreme Court of Arizona in which the legal principles involved are on all-fours with those here considered. The case is *Puterbaugh* v. *Gila County,* 46 Pac. 2nd 1064. In that case, the defendant, as a member of the county board of supervisors, obtained money for travelling expenses from the county treasurer, in violation of a statute. The same statute permitted the county to bring an action to recover such payments. While the action was pending, a new statute was passed which, by its express terms, purported to continue the former law in force, but forbade the maintenance of any action against a county officer for payments made prior to a specified date. The analogy to the present case is complete, since existing claims were destroyed but future claims approved. The defendant asserted that since the Legislature had created the cause of action, it could subsequently modify or repeal it. However, the court held that such discriminatory action invaded the province of the judiciary, and therefore invalidated the subsequent statute. We quote from the opinion:

"If the Legislature has given a right of action, it may, of course, unless prevented by some constitutional provision, repeal the law which gives that right of action, so long as rights have not vested thereunder and if the right of action itself fails, naturally the remedy fails with it. But where, as in the present case, the Legislature has not tried to take away the right of action itself, and indeed has expressly, by Chapter 74 *supra*, continued in force the provisions of the Act which gave that right, and merely attempts to prohibit the Court from hearing certain particular suits brought by virtue of those sections, we are of the opinion that it is clearly an attempted invasion by the Legislature of the functions of the Judicial Branch of the Government."

On the basis of these authorities, it is respectfully submitted that the Portal-to-Portal Act of 1947 must be held invalid as an attempted exercise of judicial power by the legislative branch of the government.

## Last Point

**It is respectfully submitted that the petition should be granted and that writs of certiorari be issued to the Court of Appeals for the Second Circuit.**

Respectfully submitted,

Manly Fleischmann,
David Diamond,
*Counsel for Petitioners.*

## APPENDIX

### Statutes and Constitutional Provisions Involved

Portal-to-Portal Act of 1947:

#1 "(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the result that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous, uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost

to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State and Local governments would occur. * * * "

#2 "(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee over-time compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which the employer employed an employee there shall be counted all that time, but only that time, during which the employee

engaged in activities which were compensable within the meaning of subsection (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

#4 "(a) Except as provided in subsection (b2), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer."

Fair Labor Standards Act of 1938:

#7 "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

#16("(b) Any employer who violated the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees similarly situated, or such employee or employees may designate an agent or

representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Constitution of the United States:

ARTICLE III

Section 1: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *"

Fifth Amendment:

"No person shall * * * be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."